

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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THE UNITED STATES OF AMERICA FOR  
THE USE AND BENEFIT OF NEWPORT  
SAND AND GRAVEL, INC.,  
Plaintiff

V.

LINCOLN D. REALTY CORPORATION  
AND  
HARLEYSVILLE WORCESTER  
INSURANCE COMPANY, SURETY,  
Defendants

CIVIL ACTION NO. 04-40061 NMG

**DEFENDANTS' MOTION TO DISMISS**

The defendants, Lincoln D. Realty Corporation ("Lincoln") and Harleysville Worcester Insurance Company ("Harleysville") move, pursuant to 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss plaintiff's complaint since it fails to state a cause of action upon which relief can be granted.

As grounds for their motion, Lincoln and Harleysville make reference to their accompanying memorandum of law and state that:

1. This is action in which the plaintiff, Newport Sand and Gravel, Inc. ("Newport") is seeking payment under a payment bond issued pursuant to 40 U.S.C. §§270a *et seq.* ("Miller Act") in connection with the construction of a United States Post Office in Clinton, Massachusetts (the "Project").

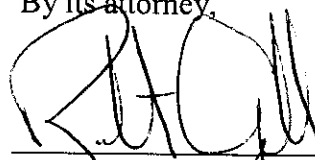
2. Because Newport failed to both provide Lincoln with notice of its claim within ninety (90) days of the date on which it last performed labor or furnished materials to the Project,

and because Newport failed to commence suit within one (1) year from the day on which it last performed labor or furnished material to the Project, its claim is barred under the Miller Act.

WHEREFORE, the defendants, Lincoln D. Realty Corporation and Harleysville Worcester Insurance Company, demand that plaintiff's claim be dismissed, together with such further relief as is appropriate.

LINCOLN D. REALTY CORPORATION  
AND HARLEYSVILLE WORCESTER  
INSURANCE COMPANY, SURETY

By its attorney,



Robert B. Gibbons, Esq.

BBO #631049

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Dated: June 24, 2004

CERTIFICATE OF SERVICE

I, Robert B. Gibbons, Esq., hereby certify that I have this day served a copy of the foregoing document, by mailing a copy, first class mail, postage prepaid, to Carl F. Schmidt, Esq., Scmitt Dillon & Smillie, 5 Mount Royal Avenue, Marlborough, MA 01752.



Robert B. Gibbons, Esq.

Dated: June 24, 2004